

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES OF AMERICA, PETITIONER,	} No.—
v.	
THE GULF REFINING COMPANY, A CORPORATION, respondent.	

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

*To the honorable the Supreme Court of the United
States:*

The United States of America hereby respectfully petitions that a writ of certiorari be issued to review the judgment of the Circuit Court of Appeals for the Eighth Circuit reversing and remanding a judgment of conviction on which a fine of \$99,000.00 was entered by the United States District Court for the Eastern District of Oklahoma on 99 counts of an indictment charging respondent with receiving concessions and discriminations in rates on shipments of gasoline from Kiefer, Drumright, and Jenks, Oklahoma, to its refinery at Port Arthur, Texas, in violation of the Elkins Act of February 19, 1903, 32 Stat. 847, as amended June 29, 1906, 34 Stat. 587. The shipments in question had been billed to respondent by

543065

its subsidiary, the Gypsy Oil Company, as "unrefined naphtha," and respondent had paid only the lower charges applicable to that commodity instead of the higher charges applicable to gasoline. January 16, 1923, said Circuit Court of Appeals entered an order denying the petition of the Government for rehearing of the case.

STATEMENT.

Respondent and the Gypsy Oil Company are both subsidiaries of the Gulf Oil Corporation, but for convenience the Gypsy Oil Company is herein referred to as respondent's subsidiary.

The Gypsy Oil Company produced condensates from natural gas at its compression plants at Kiefer, Drumright, and Jenks, Oklahoma.

The Interstate Commerce Commission, under the powers conferred upon it in the so-called Transportation of Explosives Act, Criminal Code, sections 233-236, 35 Stat. L. 1134, had issued regulations forbidding the transportation of such condensates in ordinary tank cars, unless their vapor pressure had been reduced to a maximum of 10 pounds per square inch, and requiring when so shipped, either alone or blended with other petroleum products, that they be shipped and described as gasoline, casing-head gasoline, or casing-head naphtha. These regulations further required that the shippers certify that the shipments were "properly described by name * * * according to the regulations prescribed by the Interstate Commerce Commission." (Record, 1216-1270.)

In addition, these regulations had been published and filed with the Interstate Commerce Commission by the carriers in their tariffs as Rule 44 of the Western Classification, which governed all the shipments covered by the indictment. (Record, 1040-1211.)

Respondent's subsidiary and all other shippers of such condensates, in order to reduce their vapor pressure to the maximum of 10 pounds per square inch prescribed by the Commission for shipment in ordinary tank cars, either weathered the pure condensate (that is, exposed it to the atmosphere until its pressure became reduced) or blended it with crude naphtha. As has been stated, the Commission's regulations, and the carriers' tariffs *required such condensates, either alone or blended with other petroleum products, to be shipped and described as gasoline, casing-head gasoline, or casing-head naphtha*, and prior to December 2, 1916, respondent's subsidiary (Record, 188-191, 208-209), as well as all other shippers (Record, 427-428), so shipped and described such shipments, and respondent paid the gasoline rates applicable thereto (Record, 281).

During the entire period of the indictment all other shippers continued to bill such shipments as gasoline and to pay the rates applicable thereto. (Record, 427-428.) On December 2, 1916, however, respondent obtained the publication of lower rates on "unrefined naphtha" from these Oklahoma points to Port Arthur, which rates were about 59 per cent of the rates on gasoline, and thereafter respondent's subsidiary, without making any change whatever

in the nature of its shipments (Record, 550), and contrary to the Commission's safety regulations and to the carriers' tariffs, and though continuing to certify that its shipments were properly described by name as required by the regulations of the Interstate Commerce Commission (Record, 959, 961, 963, 966), shipped and described such condensates as "unrefined naphtha" and respondent paid only the lower rates applicable to that commodity (Record, 550). Moreover, the Government contended and introduced evidence (Record, 1363-1377) showing that the respondent had obtained the publication of these rates on "unrefined naphtha" by misrepresentation and by concealing the fact that it was intended to ship these condensates under that description, contrary both to the Commission's regulations and to the carriers' tariffs. In addition, the Government proved that, though these rates on "unrefined naphtha" were open to respondent's competitors, if such were a proper description of these condensates, respondent's competitors, during the entire period covered by the indictment, continued to ship such condensates as gasoline and to pay the higher rates applicable to that commodity (Record, 427-428), and that respondent's subsidiary itself continued to use this description in shipping such condensates to other points (Record 214-215).

According to the Bureau for the Safe Transportation of Explosives, gasoline is more destructive than dynamite, and is the most destructive article handled by the railroads, and the records of that Bureau

show that at Memphis, Tennessee, on January 24, 1921, 13 people were killed, 18 people were injured, and a large loss of property resulted from an explosion of a tank car of casing-head gasoline; that at Ardmore, Oklahoma, on September 27, 1915, 39 people were killed, a large number of people were injured, and a large loss of property resulted from an explosion of another tank car of the same commodity; that at Gainesville, Texas, on May 18, 1917, 1 railway employee was killed, and 3 other persons were injured by the explosion of a tank car of casing-head gasoline blended with naphtha, shipped by respondent's subsidiary to the respondent; and that 14 other such explosions since April 21, 1911, have resulted in the death of 19 people and the injury of 58.

REASONS FOR GRANTING THE PETITION.

I.

The judgment of the Circuit Court of Appeals conflicts with, and practically nullifies, the powers of the Government under the so-called Transportation of Explosives Act to enforce the regulations promulgated by the Interstate Commerce Commission for the safe transportation of explosives and other dangerous articles.

It is most remarkable that the opinion of the Circuit Court of Appeals *does not even mention* the Commission's explosive regulations, requiring these condensates to be shipped and described as gasoline, though such regulations appear in full in the record. (Record, 1216-1270.)

II.

Said judgment practically nullifies the powers conferred upon the Interstate Commerce Commission under sections 1, 6, 13, and 15 of the Act to Regulate Commerce, to prescribe just and reasonable rates and classifications and just and reasonable regulations and practices affecting the manner in which property tendered for transportation shall be marked and described.

It is again most remarkable that the opinion of the Circuit Court of Appeals *does not even mention* the fact that Rule 44 of the Western Classification governing these shipments required such condensates to be described as gasoline, though such tariff provision appears in full in the record. (Record, 1040-1211.)

Moreover, the judgment of that court requires the carriers to accept approximately 59 per cent of their published gasoline rates on such condensates, though the gasoline rates remain the published rates, and though they have never been found unreasonable by the Interstate Commerce Commission, but, on the contrary, have been expressly held reasonable, as applied to such condensates, in the case of *Southern Carbon Company v. A. & L. M. Ry. Co.*, 62 I. C. C. 733, cited to the court in the Government's petition for rehearing.

III.

The judgment of the Circuit Court of Appeals seriously imperils the Government's interests in the

following pending litigation in relation to similar misbilling of casing-head gasoline as "unrefined naphtha":

(a) It practically precludes the Government from prosecuting 7 other criminal indictments pending in the Eastern District of Oklahoma against the respondent, its officers, and certain carriers, charging violations in this respect of the Elkins Act, of the Act to Regulate Commerce, and of the so-called Transportation of Explosives Act.

(b) It practically precludes the Government, through the Director General of Railroads, from collecting undercharges outstanding against the respondent in this respect, aggregating approximately \$500,000.

(c) It probably subjects the Government, through the Director General of Railroads as Agent of the President, to liability for overcharges in this respect, aggregating approximately \$500,000.

IV.

The action of the Circuit Court of Appeals in reversing the judgment of the District Court on the ground that the District Court erred in refusing defendant's (respondent's) request for an instructed verdict, is extraordinary and unjustifiable in any event.

This action of the Circuit Court of Appeals could only be justified if the District Court would have been warranted *in holding, as a matter of law*, that these condensates were unrefined naphtha and not

gasoline, and in withdrawing that question from the jury on that ground. In fact, the Circuit Court of Appeals reaches this conclusion by choosing by what amounts to a mere fiat to accept *as conclusive* the testimony of certain expert chemical witnesses for respondent that these condensates were *chemically* unrefined naphtha, entirely disregarding the admissions of these same experts that these condensates were popularly known as gasoline (Record, 694); that their designation as gasoline had been prescribed by the Interstate Commerce Commission for transportation purposes both with reference to safety (Record, 1216-1270) and to rating (*Southern Carbon Co. v. A. & L. M. Ry. Co.*, *supra*); that the carriers' tariffs prescribed their designation as gasoline (Record, 1040-1211); that the respondent and its subsidiary were the only shippers who ever designated such condensates as "unrefined naphtha" (Record, 427, 428); and that the respondent and its subsidiary had previously invariably designated them as gasoline (Record, 188-191, 208-209), and that respondent's subsidiary continued to so designate them in shipments to other points (Record, 214, 215).

V.

Accepting at their face value the alleged errors in the admission of certain testimony and in remarks of counsel to the jury, assigned by the Circuit Court of Appeals as among the grounds upon which that court reversed and remanded for dismissal, such errors warranted the Circuit Court of Appeals at most in remanding the case for a new trial.

In fact, the Government undertakes, if the writ is granted, to show that no errors were committed by the District Court in this respect.

It is therefore respectfully submitted that this court, in view of the public importance of the questions involved, and the extraordinary action of the Circuit Court of Appeals in reversing and remanding for dismissal, instead of at most remanding the case for a new trial, should issue its writ of certiorari to review the judgment of the Circuit Court of Appeals in this respect.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

WASHINGTON, D. C., *April —, 1923.*

○